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No. 87-292

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1987

UMBERTO DEL RIVO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner may take an interlocutory appeal from an order denying his motion to dismiss an indictment on the ground that a prior plea agreement should be interpreted as a bar to the prosecution.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3-6) and the memorandum opinions of the district court (Pet. App. 8-19) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1987. A petition for rehearing was denied on July 1, 1987 (Pet. App. 7), and the petition for a writ of certiorari was filed on August 20, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On June 14, 1984, petitioner was indicted by a grand jury sitting in the Eastern District of Louisiana. He was charged with one count of possessing marijuana with intent to distribute it and one count of conspiring to commit that offense (21 U.S.C. 841(a)(1), 846). Pursuant to a plea agreement, those charges were dismissed, and petitioner pleaded guilty to an information charging him with being an accessory after the fact (18 U.S.C. 3). He was

sentenced to six months' imprisonment. Under his plea agreement, petitioner agreed to provide information about the marijuana distribution scheme and other criminal activity in the New Orleans area. He also agreed to testify before a grand jury or at trial. In return, the government agreed not to use that information against petitioner unless petitioner committed perjury. The government also agreed not to charge petitioner with drug or income tax violations in the Eastern District of Louisiana for activity preceding the agreement of October 17, 1984 (Pet. App. 33-35).

On December 19, 1985, petitioner was indicted in the United States District Court for the Southern District of Ohio on one count of conspiring to possess marijuana with intent to distribute it (21 U.S.C. 841(a)(1)), two counts of income tax evasion (26 U.S.C. 7201), and one count of conspiracy to defraud the United States by failing to provide accurate information to the Internal Revenue Service (18 U.S.C. 371). Before trial, petitioner moved to dismiss those charges, claiming that they violated his rights under the Double Jeopardy Clause and contravened his plea agreement in the Eastern District of Louisiana.

The district court conducted an evidentiary hearing, at which the prosecutor from the Eastern District of Louisiana testified. The court then ruled against petitioner, denying both motions (Pet. App. 8-19). The court found that jeopardy never attached on the Louisiana marijuana conspiracy charges, so the new indictment did not violate the Double Jeopardy Clause (Pet. App. 9). In addition, the court determined that the two marijuana conspiracy charges were different, because the new indictment involved events in Ohio only, while the Louisiana federal indictment charged a single importation into Louisiana (*id.* at 9-12, 17-18). The district court likewise rejected petitioner's contention that his Louisiana federal plea agreement barred the present tax charges. The court found that

the agreement was unambiguous and bound the government only in the Eastern District of Louisiana, so that the charges in the Southern District of Ohio were not affected by the agreement (*id.* at 12-14, 18-19).[1]

2. In an unpublished opinion, the court of appeals affirmed on the double jeopardy claim and dismissed the appeal on the claim that the new indictment violated petitioner's earlier plea agreement (Pet. App. 3-6). The court of appeals agreed with the district court that petitioner had no double jeopardy claim on the marijuana charges, because jeopardy never attached to those charges in his earlier prosecution (*id.* at 4). With respect to petitioner's claims about the plea agreement, the court of appeals held that it lacked jurisdiction over petitioner's claims because there was no final judgment (*id.* at 5-6). Relying on its previous decision in *John Doe Corp.* v. *United States*, 714 F.2d 604, 606 (6th Cir. 1983), the court held that a claim of violation of a plea agreement did not constitute an exception to the final judgment rule and was not a matter that could be presented on interlocutory appeal from a pretrial ruling in a criminal case. Pet. App. 5-6.[2]

ARGUMENT

Petitioner raises no double jeopardy issues here; rather, his only challenge (Pet. 3-9) is to the decision of the court of appeals that his claim of violation of a prior plea agreement is not a proper subject for interlocutory appeal.

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[1] The district court was later provided the transcript of petitioner's guilty plea proceeding in the Eastern District of Louisiana. The court adhered to its rulings after reviewing that transcript. Pet. App. 16-19.

[2] The court of appeals denied rehearing and rehearing en banc on July 1, 1987 (Pet. App. 7). On July 14, 1987, petitioner sought a stay of mandate from the court of appeals. On August 13, 1987, the court of appeals denied a stay of mandate. The mandate issued on August 18, 1987. Petitioner has not sought a stay from this Court. Trial has been scheduled for October 26, 1987.

The decision of the court of appeals on that point, however, is correct and is compelled by binding precedent of this Court. At least four other courts of appeals have reached the same result. Although one court of appeals (the Second Circuit) has reached a contrary result in decisions rendered in 1976 and 1985, we submit that the conflict in the circuits is not one that merits resolution by this Court, given the infrequency with which the issue arises, the existence of binding precedent from this Court, and the substantial indications that the Second Circuit might reconsider its unique rule in an appropriate case.

1. This case is controlled by *Heike* v. *United States*, 217 U.S. 423 (1910). In that case, the defendant claimed that a statute granted him immunity from prosecution, and he sought to appeal, before trial, a ruling of the trial court rejecting his contention. This Court unanimously held that no interlocutory appeal could be taken. The Court explicitly rejected the argument "that this judgment must be held to be final for the purpose of review, otherwise the Government cannot keep the contract of immunity which it has made with the accused" (217 U.S. at 430); reversal of any final judgment of conviction, this Court held, would be sufficient to protect the defendant's interests if his claim of immunity from prosecution was correct (*id.* at 430-433).

Petitioner's argument (see Pet. 6) amounts to nothing more than the same argument that was rejected in *Heike*—that he has a "contract of immunity" with the government that requires pretrial vindication if it is to be vindicated at all. That argument is no more compelling in this case than it was in *Heike:* reversal of a conviction would vindicate petitioner's interests if his underlying contention were correct, and acquittal or other favorable termination of petitioner's criminal charges in the trial court would avert the necessity of reviewing that contention. To

be sure, this case involves a plea agreement made specifically between the government and petitioner, whereas *Heike* involved a statutory grant of immunity to all persons in a defined class, but that distinction makes no difference in the analysis. Both the plea agreement in this case and the statute in *Heike* are "contracts" binding on the government, and both would have resulted in pretrial termination of the prosecution if the trial court had agreed with the defendant's contention. There is no distinction between the two situations that would justify granting petitioner a right to interlocutory appeal that was denied to the defendant in *Heike*.

In the 1970s, as the rule allowing appeal from denials of double jeopardy claims developed (see *Abney* v. *United States*, 431 U.S. 651, 657 (1977) (affirming that rule and collecting cases)), a question arose whether the principles of *Heike* remained valid. In *United States* v. *Alessi*, 536 F.2d 978 (1976) (*Alessi I*), the Second Circuit did not even cite *Heike* in the course of holding that, by analogy to double jeopardy claims, claims of government breach of a plea agreement could be the subject of an interlocutory appeal.[3]

Just one year after *Abney*, however, this Court reaffirmed the continuing vitality of *Heike*. In *United States* v. *MacDonald*, 435 U.S 850, 860 (1978), the Court unanimously rejected the "superficial[ly] attracti[ve] * * * argument" that all claims that would result in dismissal of the indictment must, like double jeopardy claims, be presentable on interlocutory appeal. See also *United States* v. *Hollywood Motor Car Co.*, 458 U.S. 263, 268-270

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[3] In a later chapter of the same litigation, however, a different panel of the Second Circuit (per Judge Friendly), citing *Heike*, indicated that it disagreed with the prior panel as to appealability. *United States* v. *Alessi*, 544 F.2d 1139, 1143-1152, cert. denied, 429 U.S. 960 (1976) (*Alessi III*); see 544 F.2d at 1152 ("[i]f the point were open in this circuit, we would cast our lot in favor of the continuing vitality of *Heike*").

(1982) (per curiam). As an explicit example of nonappealable orders, this Court, citing *Heike,* wrote: "Dismissal of the indictment is the proper sanction when a defendant has been granted immunity from prosecution * * *. Obviously, however, this has not led the Court to conclude that such defendants can pursue interlocutory appeals." 435 U.S. at 860 n.7.

In light of *MacDonald's* explicit reaffirmance of *Heike* (see also *Flanagan* v. *United States,* 465 U.S. 259, 270 (1984)), there is no basis to maintain that interlocutory appeal is proper in this case. Petitioner's rights under the plea agreement are not, as he maintains, analogous to double jeopardy rights that will be lost if not vindicated before trial, but rather are precisely equivalent to the rights of the defendant in *Heike;* the possibility of vindication on appeal from a final judgment is sufficient to protect petitioner's rights.[4]

2. Although the courts of appeals often fail to cite *Heike,* all but one of the courts of appeals that have addressed the issue presented by this case have reached the result that *Heike* compels, holding that pretrial denials of motions to dismiss based on prior plea agreements are not immediately appealable. See *John Doe Corp.* v. *United States,* 714 F.2d at 606; *United States* v. *Bird,* 709 F.2d 388, 392 (5th Cir. 1983); *United States* v. *Rosario,* 677 F.2d 614, 615 n.4 (7th Cir.), cert. denied, 459 U.S. 867 (1982); *United States* v. *Eggert,* 624 F.2d 973, 975-976

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[4] As the Fifth Circuit observed in *United States* v. *Bird,* 709 F.2d 388 (1983), in rejecting an argument identical to petitioner's, a defendant's rights under a plea agreement are not equivalent to a right not to be tried. "It is not enough that an eventual conviction would be invalid. Ms. Bird's asserted right fails this test. Her plea that the agreement bars her prosecution can be fully vindicated, if appropriate, in an appeal from any conviction the government obtains in her case. While the agreement is phrased in terms of nonprosecution, its essence is a promise of immunity. Her immunity from punishment will not be lost simply because she is forced to stand trial." 709 F.2d at 392.

(10th Cir. 1980); *United States* v. *Solano*, 605 F.2d 1141, 1142-1143 (9th Cir. 1979), cert. denied, 444 U.S. 1020 (1980); see also *United States* v. *Brizendine*, 659 F.2d 215 (D.C. Cir. 1981); cf. *United States* v. *Levine*, 658 F.2d 113, 127 (3d Cir. 1981) (in discussion of appealability of a different kind of order, noting "[t]he continuing vitality of *Heike*").

Standing against this weight of authority are the Second Circuit's decisions in *Alessi I* and *United States* v. *Abbamonte*, 759 F.2d 1065, 1070-1071 (1985), that a defendant may take an interlocutory appeal when he claims that a prior plea agreement bars the government from bringing the charges alleged. For several reasons, we do not think it is necessary for this Court to resolve the conflict between the Second Circuit and the other circuits that have considered the issue.

First, this issue arises infrequently. Even in the Second Circuit, we know of no defendant other than the defendants in *Alessi* and *Abbamonte* who has called on the Second Circuit to decide, on an interlocutory basis, a claim of breach of a plea agreement—despite the passage of nine years between *Alessi I* and *Abbamonte*, and another two years since *Abbamonte*.

Second, both the *Alessi I* panel and the *Abbamonte* panel failed to cite *Heike*, even though, as Judge Friendly noted in *Alessi III*, *Heike* seems to compel the opposite result (see note 3, *supra*). Although the *Abbamonte* decision was rendered after this Court reaffirmed *Heike* in *MacDonald*, the *Abbamonte* panel failed to note the pertinent language from *MacDonald*. We trust that, in a future case, a Second Circuit panel that is made aware of *Heike* and its reaffirmance in *MacDonald* will give serious consideration to our contention that *Heike* is controlling and will reconsider the jurisdictional portions of the decisions in *Abbamonte* and *Alessi*.

Third, there are other indications that the Second Circuit might reconsider its unique rule in an appropriate case. In *Alessi III*, the panel disagreed with *Alessi I* but explicitly indicated that it failed to call for en banc reconsideration of *Alessi I* because, among other things, "as in * * * *Alessi I*, [the court] agree[d] with the Government on the merits" (544 F.2d at 1143). Likewise, in *Abbamonte*, the panel considered itself "obliged to follow the holding on appealability in *Alessi*" (759 F.2d at 1071) but then ruled for the government on the merits (*id.* at 1072). *Abbamonte* thus represents only adherence to, not independent endorsement of, a decision that some members of the Second Circuit had already declared was wrongly decided and merited en banc reconsideration.[5] There was, of course, no occasion for the government to seek such reconsideration in *Abbamonte* because the government prevailed on the merits. Indeed, the fact that the defendants in both *Alessi* and *Abbamonte* have failed on the merits of their claims means that *no* defendant has ever in fact benefited (except by delaying trial) from the *Alessi/Abbamonte* rule.

In sum, we recognize the conflict in the circuits, but we submit that it is one that this Court does not need to resolve at this time, and may never need to resolve.

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[5] Indeed, the *Abbamonte* court's uncertainty about the *Alessi* holding may be reflected in the fact that the court thought it appropriate to comment on an "arguably available" independent basis – pendent jurisdiction – for reaching the merits of the defendant's claim of breach of a plea agreement (759 F.2d at 1071 n.3).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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